U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 17, 2023

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BOARD DECISION

Appellant: Arthur E. Fisher
Agency: Department of the Interior
Decision Number: 2023 MSPB 11
Issuance Date: March 16, 2023
Appeal Type: Reduction in Force

REDUCTION IN FORCE
WHISTLEBLOWER PROTECTION ACT

The appellant was a Realty Officer with the Bureau of Indian Affairs until December 4, 2015, when he was separated from the agency by a reduction in force. Prior to his separation, in or around May 2014, the appellant filed complaints with the Office of Special Counsel (OSC) and the agency's Office of Inspector General (OIG).

The appellant appealed his separation to the Board and raised affirmative defenses of age discrimination and whistleblower reprisal. After a hearing, the administrative judge affirmed the separation and found that the appellant failed to prove his affirmative defenses. Regarding the whistleblower reprisal claim, the administrative judge found that the appellant failed to prove that he made a protected disclosure under 5 U.S.C § 2302(b)(8). She found that, in

the alternative, if the appellant proved that his disclosures were protected, he would have met his burden to show that they were a contributing factor in his separation, but that the agency nevertheless proved by clear and convincing evidence that it would have separated the appellant absent his protected disclosures. The appellant filed a petition for review, primarily challenging the administrative judge's findings concerning his whistleblower reprisal defense.

Holding: The appellant proved that he engaged in protected activity under 5 U.S.C. § 2302(b)(9)(C). Under the broadly worded provision of 5 U.S.C. § 2302(b)(9)(C), any disclosure of information to OIG or OSC is protected regardless of its content, as long as such disclosure is made in accordance with the applicable provisions of law.

1. The appellant did not challenge the administrative judge's finding that he failed to prove that he made protected disclosures under 5 U.S.C. § 2302(b)(8), and the Board therefore affirmed those findings.
2. Under 5 U.S.C. § 2302(b)(9)(C), an employee engages in protected activity when he discloses information to the agency's OIG or to OSC "in accordance with applicable provisions of law." The Board held that, under the broadly worded provision of 5 U.S.C. § 2302(b)(9)(C), any disclosure of information to OIG or OSC is protected regardless of its content as long as such disclosure is made in accordance with the applicable provisions of law. Accordingly, the appellant's filings with OSC and the OIG qualified for protection under this provision.

Holding: The appellant failed to prove that his protected activity was a contributing factor in his separation.

1. Although the administrative judge determined that, had the appellant established that he made protected disclosures under 5 U.S.C. § 2302(b)(8), he would have met his burden of demonstrating that the disclosures were a contributing factor in his separation, the Board found that the appellant failed to show that his protected activity under 5 U.S.C. § 2302(b)(9)(C) was a contributing factor in the agency's action.
2. The Board found no evidence that the agency official responsible for the reduction in force knew of the appellant's protected activity. Because the appellant failed to prove that his protected activity was a contributing factor in his separation, it is unnecessary to determine whether the agency proved by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

Holding: The amendment of 5 U.S.C. § 2302(b)(9)(D) under the Follow the Rules Act (FTRA) is not retroactive.

1. When the events at issue in this appeal took place, 5 U.S.C. § 2302(b)(9)(D) made it a prohibited personnel practice to take an action against an employee for "refusing to obey an order that would require the individual to violate a law." The U.S. Court of Appeals for the Federal Circuit held in *Rainey v. Merit Systems Protection Board*, 824 F.3d 1359, 1361-62, 1364-65 (Fed. Cir. 2016), that protection in section 2302(b)(9)(D) extended only to orders that would require the individual to take an action barred by statute, and not to orders that would require the individual to violate an agency regulation or policy.
2. On June 14, 2017, while this matter was pending before the Board, the President signed into law the FTRA, which amended section 2302(b)(9)(D) by inserting after "law" the words "rule, or regulation."
3. In considering whether the FTRA applies retroactively, the Board considered that Congress did not expressly state that the FTRA should apply retroactively and that, if applied retroactively, the FTRA would increase a party's liability for past conduct. Although there is some evidence that Congress intended the FTRA to clarify the meaning of the original language in section 2302(b)(9)(D), the Board found that the FTRA was not a clarification of the prior law. Although declarations of Congressional intent are relevant in determining whether a statutory provision is a clarification, such declarations are entitled to less weight when they appear in legislative history, rather than in the statute itself. Further, the Board considered that there is no history of conflicting interpretations or other evidence that the prior statutory language was ambiguous.
4. Because the Board held that the FTRA is not retroactive, the appellant's claims that the agency retaliated against him for refusing to obey orders that would require him to violate agency rules or regulations are outside the scope of section 2302(b)(9)(D).

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Yuriy Mikhaylov
Respondent: Department of Homeland Security
Tribunal: U.S. Court of Appeals for the Fourth Circuit
Case Number: 21-1169
Issuance Date: March 15, 2023

WHISTLEBLOWER PROTECTION ACT

The petitioner has worked for the agency's Immigration and Customs Enforcement division (ICE) since 1998. In 2018, the petitioner instructed another employee to make a purchase for certain items on an agency purchase card. The purchase would have violated agency policy and the employee refused the petitioner's order. Less than 1 hour after learning that the employee would not make the purchases, the petitioner began the process of removing him from his position of Senior Firearms Instructor.

The employee filed a complaint with the Joint Intake Center alleging that the petitioner removed him from his position in retaliation for his refusal to violate ICE policy. During the investigation, the petitioner made several protected whistleblower disclosures. At the conclusion of the investigation, the Office of Professional Responsibility recommended that the matter be referred to management. Thereafter, a disciplinary panel concluded that the petitioner committed conduct unbecoming by directing an employee to make a purchase that was prohibited by ICE policy and recommended that the petitioner be suspended for 14 days. The deciding official mitigated the proposed 14-day suspension to a 2-day suspension.

The petitioner appealed to the Board. After a hearing, an administrative judge concluded that three of the petitioner's disclosures were protected, but that the petitioner failed to prove that the protected disclosures contributed to the agency's decision to suspend him. Alternatively, agency established by clear and convincing evidence that it would have taken the actions in the absence of any protected disclosures. Accordingly, the administrative judge sustained the 2-day suspension and denied the petitioner's request for corrective action. The petitioner filed a petition for review with the Fourth Circuit.

Holding: The petitioner failed to prove that his protected disclosures were a contributing factor in the agency's decision to suspend him for 2 days.

1. The court disagreed with the petitioner's assertion that the disclosures were contributing factors in the personnel action as a matter of law because the deciding official learned of the disclosures shortly before imposing the suspension. Rather, it held that a disclosure is only a contributing factor when the confluence of the official's knowledge and the timing of the action reasonably suggests a connection between the two.
2. The court found that the petitioner's disclosures were not a contributing factor in the personnel action because the disciplinary process was initiated before the petitioner made the disclosures and the deciding

official was outside of the petitioner's chain of command and was not connected in any way to the disclosures.

Holding: Alternatively, the agency proved by clear and convincing evidence that it would have taken the same action in the absence of the petitioner's protected disclosures.

1. When considering whether the agency met its burden, the court considered the factors set forth by the U.S. Court of Appeals for the Federal Circuit in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999).
2. As to the first *Carr* factor, i.e., the strength of the agency's case supporting the personnel action, the court deferred to the administrative judge's credibility determinations and agreed that there was ample evidence to support the discipline against the petitioner.
3. The second *Carr* factor requires consideration of the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision. The court found that this factor weighed in favor of the agency because it was the employee's complaint that began the investigation and not any action by the petitioner's supervisors. It also noted that the disciplinary panel was composed of independent managers that were not part of the petitioner's chain of command and that the fact that the penalty was mitigated by the deciding official suggested there was no retaliatory motive.
4. Finally, the third *Carr* factor requires consideration of evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. On this point, the court found unavailing the petitioner's argument that the agency did not discipline his supervisor for misconduct after her retirement, citing the agency's policy of not pursuing disciplinary actions after an employee retires. Although the court noted that the supervisor was rehired after her retirement from the agency as part of a settlement agreement, it accepted the administrative judge's conclusion, after hearing all of the evidence, that the agency's different treatment of the supervisor did not show that the agency was retaliating against the petitioner.

NONPRECEDENTIAL:

Kananowicz v. Merit Systems Protection Board, No. 2022-1596 (Fed. Cir. March 14, 2023) (MSPB Docket No. PH-1221-22-0056-W-1). The court affirmed the dismissal of the appellant's individual right of action (IRA) appeal for lack of jurisdiction, finding that the appellant failed to

nonfrivolously allege that he made a protected disclosure under 5 U.S.C. § 2302(b)(8)(A).

Mikhaylov v. Department of Homeland Security, No. 2021-2429 (4th Cir. March 15, 2023) (MSPB Docket No. PH-1221-21-0255-W-1). The court affirmed the denial of corrective action in the appellant's IRA appeal, finding that the agency proved that it would have taken the same actions in the absence of the appellant's protected whistleblowing.